Supreme Court, U.S.
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No. 10-_____

In The

Supreme Court of the United States

WILLIAM MAGDALIN,
PETITIONER,

vs.

COMMISSIONER OF THE INTERNAL REVENUE SERVICE,
RESPONDENT.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the First Circuit

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PETITION FOR WRIT OF CERTIORARI

WILLIAM MAGDALIN M.D.
10 JOY TERRACE
Methuen, MA 01844
(617) 519-8204
wmagdalin@luxsci.net

Blanchard Press, Inc. – Boston, MA 02210 – 617-426-6690

QUESTION PRESENTED FOR REVIEW

Medical expenses for reproduction are allowed by the IRS, but with the advent of new technologies in assisted reproduction the following questions have surfaced:

1. Is reproduction a function or structure of only the female body, and not the male body?

2. Does the IRS significantly infringe on Equal Rights Protection Clause, when the IRS uses one set of rules allowing medical deductions for a variety of reproductive expenses, in health or disease, for women; while it restricts men, by enforcing another set of rules, requiring men to demonstrate disease?

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OPINIONS

On December 23, 2008 in the United States Tax Court, Docket 7880-07, Judge Robert A. Wherry, Jr. enter a decision and Memorandum Opinion (T.C. Memo 2008-293) and decision was entered for respondent.

On December 17, 2009 in the United States Court of Appeals for the First Circuit, before Circuit Judges Torruell, Lipez and Howard entered a decision summarily affirming the Tax Courts Decision.

JURISDICTION

The court of appeal's judgment was entered on December 17, 2009 and a timely petition of writ of certiorari is filled.

STATUTE INVOLVED

I.R.C. § 213(d) Definitions For purposes of this section-
(1) The term "medical care" means amounts paid-
(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,

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I.R.C. § 213(d) Definitions For the purposes of this section-
(2) Amounts paid for certain lodging away from home treated as paid for medical care.- Amounts paid for lodging (not lavish or extravagant under the circumstances) while away from home primarily for and essential to medical care referred to in paragraph (1)(A) shall be treated as amounts paid for medical care if-

(A) the medical care referred to in paragraph (1)(A) is provided by a physician in a licensed hospital (or in a medical care facility which is related to, or the equivalent of, a licensed hospital), and
(B) there is no significant element of personal pleasure, recreation, or vacation in the travel away from home.

Treasury Regulations § 1.213-1(e) Definitions-(1) General. (ii) Amounts paid for operations or treatments affecting any portion of the body, including obstetrical expenses and expenses of therapy or X-ray treatments, are deemed to be for the purpose of affecting any structure or function of the body and are therefore paid for medical care. Amounts expended for illegal operations or treatments are not deductible. Deductions for expenditures for medical care allowable under section 213 will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. Thus, payments for the following are payments for medical care: hospital services, nursing services (including nurses' board where paid by the taxpayer), medical, laboratory, surgical, dental and other diagnostic and healing services, X-rays, medicine and drugs (as defined in subparagraph (2) of this paragraph, subject to the 1-percent limitation in paragraph (b) of this section), artificial teeth or limbs, and ambulance hire. However, an expenditure which is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care.

STATEMENT OF THE CASE

Most medical expenses pertaining to reproduction can be deducted under the I.R.C. § 213 (d)(1)(A) "structure or function" which is one of a two prong qualifications of what constitutes a medical expense, the other being "desease". Commonly human reproduction is not a state of disease (first prong), it falls under the "structure or function" part of the two prong qualification.

Treas. Reg., Subchapter A, § 1.213-1(e)(1)(i) is the tax code applied by the IRS as from I.R.C. § 213 (d)(1)(A), both containing very similar language.

On the other hand, some medical expenses may not be claimed if they are but only beneficial to general health and not medical by nature, such as vacations, vitamins or gym memberships. This is the so called "but for rule."

Treas. Reg., Subchapter A, § 1.213-1(e)(1)(ii) derived from I.R.C. § 213 (d)(2)(A)and(B) deviates from the language from the Internal Revenue Code. In the process the following language was added to Treas. Reg. 1.213-1(e)(1)(ii): "Deductions for expenditures for medical care allowable under section 213 will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness." This statement is in contraction to I.R.C. § 213 (d)(1)(A) "structure or function" two prong law. A paradox results, as applied by Judge Wherry's Tax Court decision, the petitioner is exclude from benefiting from the I.R.C. 213(d)(1)(A) two prong qualification, "disease or function/structure," since the petitioner must always

satisfy the exclusionary language of Treas. Reg. 1.213-1(e)(1)(ii).

Finally, the structure/function language of both I.R.C 213 and Tres. Reg, 1.213, is to large extent applied to women, but the petitioner, a male, was excluded based of preconceived notions of gender roles and applied biologically. Although, the petitioner made an argument in support of why men's bodies have structure and function for reproduction, the responded offered no opposing view. The assertion that reproduction is only a women's function, is gender discriminatory. An exceedingly persuasive justification does not exist to support gender based discrimination, and is at odds with the Equal Protection Clause of the US Constitution.

ARGUMENT[1]

The IRS argued, in the Magdalin case, that a taxpayer can claim a medical expense deduction only if the taxpayer is suffering from a "disease," even if the medical procedure affects the structure or function of the body of the taxpayer or his spouse or dependent.[2] There are two obvious problems with this argument. First, it ignores the disjunctive "or" in section 213(d)(1)(A). Second, under this argument, men, who are not suffering from a "disease" could never deduct fertility treatment costs - or any other reproductive medical expenses - in the absence of "disease." This argument completely ignores the line of administrative pronouncements and cases in which various types of reproductive medical expenses have been classified as medical care under the "structure or function" prong of the definition.[3] This argument also ignores the fact that the IRS has consistently taken the position that obstetric care, including labor and delivery expenses, and various other types of reproductive medical care that prevent or end pregnancy are medical care,

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[1] Katherine Pratt, "Deducting the Costs of Fertility Treatment: Implications of Magdalin v. Commissioner for Opposite-Sex Couples, Gay and Lesbian Same-Sex Couples, and Single Women and Men" Loyola Law School LA, Loyola-LA Legal Studies Research Paper No. 2009-33. The majority of text is taken verbatim and is too numerous to credit. Conclusion are the petitioner's.

[2] Magdalin v. Comm'r No. 7880-07. Respondent's Opening Brief at 16-19, arguing that the taxpayer must always satisfy the "disease" prong of the definition, because the legislative history of section 213 and Treas. Reg. 1.213-1(e)(1)(ii) indicate that a deduction is allowed only for expenses "incurred primarily for the prevention or alleviation of a physical or mental defect or illness").

[3] Treas. Reg. § 1.213-1(e)(1)(ii).

despite the arguable absence of "disease" in the reproductive context.

In support of the conclusion that deductibility requires a showing of a disease or condition, Judge Wherry cited the Tres. Reg. 213, which provide that section 213 medical expense deductions "will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness."[4] He also cited section 213 cases,[5] including Havey [6] and Jacobs,[7] for case law tests that require a showing of a "but for" (or direct and proximate) relationship between the expense and a disease or medical condition. In the cited cases, however, the issue was whether the taxpayer could deduct expenses that were not inherently medical (vacation travel in Havey, and divorce expenses, in Jacobs). In Magdalin, the taxpayer deducted inherently medical expenses (for IVF), plus the ancillary expenses (for the egg donor and sperm donor) attributable to the IVF and embryo implantation. Although Judge Wherry noted that the section 213 definition is written in the disjunctive, he seemed to assume that the "structure or function" prong of the definition is relevant only in the context of cosmetic surgery, and became irrelevant after the 1990 cosmetic surgery amendment.[8] There are no

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[4] Magdalin v. Comm'r No. 7887-07 T.C. Memo 2008-293 A-9 (citing Treas. Reg. § 1.213-1(e)(1)(ii)).

[5] Id. at A-7, A-8.

[6] Havey v. Comm'r 12 T.C 409 (1949) (medical expense deduction denied for the costs of medically recommended travel).

[7] Jacobs v. Comm'r, 62 T.C. 813,820 (1974) (legal fees paid in a divorce proceeding that may have improved the taxpayer's depression were not deductible medical expenses, because the taxpayer would have paid the legal fees even if the taxpayer had not been depressed).

[8] Magdalin slip op., note 6 at A-12

pronouncements on the role of the "structure or function" prong in the context of determining deductibility of the costs of reproductive care.

The IRS did not concede the more general point that the costs of reproductive medical treatments are medical care, even in the absence of "disease" (broadly construed), in response to Dr. Magdalin's assertion that the costs of legal abortions, vasectomies, contraceptives, and sterilizations all are medical care.[9]

The IRS did argue, in Magdalin, that reproduction is not "a covered function of the male taxpayer's body, within the meaning of section 213(d)(1)(A) [the definition of medical care]," [10] but provided no support for this argument. In a footnote, the court mentions, but does not evaluate this "unexplained assertion" made by the IRS. [11] It is clear that the IRS argument argues that procreation is not a function of "the taxpayer's male body." This point begs to be resolved by this Supreme ourt.

In Magdalin, the IRS argued and Judge Wherry agreed, however, that a taxpayer can deduct medical expenses only if the taxpayer can show a relationship between the expense and a disease or medical condition[12] - and the authority for this interpretation of the definition includes general statements in the Treas. Reg 213 regulations and the 1942 legislative history of I.R.C. 213, and cases that do not involve inherently medical expenses.[13] This reading of the section 213(d)(1)(A) definition interprets the definition to require that the

[9] Magdalin v. Comm'r No. 7880-07 (T.C. June 25, 2008) [hereinafter Petitioner's Opening Brief, Magdalin], A-9.

[10] Magdalin v. Comm'r No. 7880-07 (T.C. July 30, 2008) (hereinafter Respondent's Opening Brief, Magdalin) at 11, 15.

[11] Magdalin slip op., note 6 at A-12

[12] Respondent's Opening Brief, Magdalin, at 16, 19.

[13] Respondent's Opening Brief, Magdalin, at 16

first "disease" prong always be satisfied. If an expense satisfied the second "structure or function" prong, but not the "disease" prong, the taxpayer would be denied a deduction under this approach. Judge Wherry did not seemed concerned about deemphasizing the "structure or function" prong, because he characterized that prong as applying to cosmetic surgery that no longer is classified as a medical expense.[14] He did not consider the implications of this approach for the category of care that is quintessentially within the second prong but not the first "disease" prong - reproductive care.282 And, that it systematically denies taxation benefits to predominately men seeking reproductive care.

In the broadest interpretation of the IRS argument is that procreation is a "function" of a woman's body, but not a man's body, as the term "function" is used in the "structure or function of the body" prong of the definition of medical care.[15] This interpretation is preposterous. Although men do not become pregnant or bear children, men have reproductive systems and functioning, and sometimes require reproductive medical care. The IRS assertion may be based on: (1) the commonly held, but erroneous assumption that infertility is always attributable to the woman; and (2) the fact that assisted reproductive technologies (IVF, egg donor, and surrogacy) require that a woman receive medical treatment to conceive and bear a child, regardless of the cause of the infertility (medical or otherwise). Section 213 is facially neutral and does not preclude use of ARTs. In

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[14] Magdalin slip op. at A-8.

[15] Id. note 6 at A-12, ("respondent makes the unexplained assertion that respondent 'does not believe that procreation is a covered function of petitioner's male body within the meaning of section 213(d)(1).'").

tax law, it is axiomatic that deductions are a matter of "legislative grace,"[16] and distinctions in the tax law almost invariably are constitutional.[17] As Justice O'Connor notes, in her concurrence in Lawrence v. Texas, "laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster." [18] Tax cases routinely uphold the denial of tax deductions, in spite of Constitutional challenges. [19]

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[16] See, e.g., New Colonial Ice v. Helvering, 292 U.S. 435, 440 (1934) ("[w]hether and to what extent deductions shall be allowed depends on legislative grace: and only as there is clear provision therefor can any particular deduction be allowed").

[17] See, e.g., Yoseph Edrey, Constitutional Review and Tax Law: An Analytical Framework, 56 AM. U.L. REV. 1187, 1206 (2007) ("U.S. courts are ... reluctant to subject tax law to constitutional review").

[18] Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

[19] See, e.g., New Colonial Ice v. Helvering, 292 U.S. 435, 440 (1934), Klaassen v. Comm'r, No. 98-9035, 1999 U.S. App. LEXIS 6320 (10th Cir. 1999) (unpublished opinion) (upholding tax classifications despite the taxpayer's First Amendment, Due Process, and Equal Protection claims) [hereinafter Klaassen]. In Klaassen, the Tenth Circuit observed that the tax classifications at issue in the case were facially neutral and not designed to create distinctions based on religion, and thus created only an indirect burden on the taxpayer's exercise of religion. Klaassen, supra, at *2-4. The Court added that "even a substantial burden would be justified by the 'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs.'" Id. at *4 (citations omitted). Noting the "compelling government interest" served by the "uniform application of the [Alternative Minimum Tax] provisions," the Court rejected the First Amendment challenge. Id. at *5. The Court also rejected the taxpayer's Due Process and Equal Protection claims, on the basis of its finding that the Alternative Minimum Tax provisions "bear a rational relation to a legitimate governmental purpose." Id.

Tax legislation carries a 'presumption of constitutionality,' ... and legislatures have considerable latitude in creating classifications and distinctions in the tax statutes.... [T]he fact that a generally applicable - but neutral - law 'may have the effect of making the [exercise of Constitutional rights] more expensive does not render the statute unconstitutional....' Moreover, deductions are a matter of legislative grace. Thus, a taxpayer may overcome the presumption of constitutionality 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' [20]

> Tax legislation carries a 'presumption of constitutionality,' ... and legislatures have considerable latitude in creating classifications and distinctions in the tax statutes.... [T]he fact that a generally applicable - but neutral - law 'may have the effect of making the [exercise of Constitutional rights] more expensive does not render the statute unconstitutional....' Moreover, deductions are a matter of legislative grace. Thus, a taxpayer may overcome the presumption of constitutionality 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.'

Although Congress had not created a tax rule that discriminated against predominately men - for the purpose of harming them as a group - such a tax rule

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[20] Id. at *4 (citations omitted).

might not survive even rational basis review, under Lawrence v. Texas, but by conjunctively applying I.R.C §213 and Tres. Reg. 213 regulations, as applied in the Magdalin case, this explicitly discriminates against him as a class or particular persons, who should be constitutionally protected. [21]

In Harris v. McRae, [22] the Supreme Court held that the denial of government funding for an indigent woman's abortions did not violate the liberty or equal protection interests guaranteed by the Fifth Amendment Due Process Clause.[23] Similarly, in Maher v. Roe, the Court upheld a Connecticut statute that funded childbirth, but not nontherapeutic abortion, for indigent women.[24] The Mayer court drew a distinction between legislation that directly denies access to reproductive care, and legislation that reduces access to reproductive care based on cost. Although entitlement laws are inherently subsidies for specific groups; Revenues based on gender for medical expenses, on the other hand, as in the Magdalin case, singles out men predominately and is hostile to this group. Tax revenues are, by nature, discriminatory, but when based largely on gender as an end result, this should be protected is under the Equal Protection Laws.

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[21] Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (majority holding Texas anti-sodomy statute unconstitutional, under the Due Process Clause, and O'Connor concurring, but basing her conclusion on the Equal Protection Clause).

[22] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding federal law that denied Medicaid funding for an indigent woman's medically necessary abortion).

[23] *Id.*

[24] Maher v. Roe, 432 U.S. 464, 474 (1977) (upholding Connecticut statute that funded childbirth, but not nontherapeutic abortion, for indigent women).

This scrutiny was addressed in Reed v. Reed [25], a case challenging an Idaho statute that required that males be preferred to equally qualified females as administrators of estates. The Court found that the statute represented "the kind of arbitrary legislative choice forbidden by the Equal Protection Clause," and established that sex-based discrimination was entitled to higher scrutiny under the Constitution, later to be understood as "middle tier" level scrutiny. Under the "substantial relationship" test, the government must show an important reason to justify its classification, and there must be a close relationship between the government's act and its purpose. The governmental act must be "reasonable, not arbitrary...and rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced will be treated alike."

[25] *Reed v. Reed*, 404 U.S. 71 (1971)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

WILLIAM MAGDALIN M.D.
10 JOY TERRACE
Methuen, MA 01844
(617) 519-8204
wmagdalin@luxsci.net

United States Court of Appeals For the First Circuit

No. . 09-1153

WILLIAM MAGDALIN,
Petitioner - Appellant,

v.

COMMISSIONER OF IRS,
Respondent - Appellee.

[Before Torruella, Lipez and Howard, Circuit Judges]

JUDGEMENT

Entered: December 17,2009

Petitioner William Magdalin appeals a decision of the tax court holding non-deductible certain expenses he incurred in connection with fathering two children via in vitro fertilization of an anonymous donor's eggs with petitioner's sperm and placement of the resulting embryos in unrelated gestational carriers who gave birth to them. Petitioner stipulated in the tax court proceedings that he was not.infertile and that he had had two children via natural processes with his now ex-wife.

This court reviews the tax court's factual findings for clear error and its legal conclusions de novo. Drake v.

Comm'r, 511 F.3d 65,68 (1st Cir. 2007). "Clear error exists, if, on the entire record, the court is 'left with the definite and firm conviction that a mistake has been made. !II Haffner's Servo Stations, Inc.V. Comm'r, 326 F.3d 1,3 (lst Cir. 2003) (quoting Mitchell V. United States, 141 F.3d 8, 17 (lst Cir. 1998». We agree with the tax court and therefore summarily affirm its decision. As the court concluded, the various expenses incurred by petitioner were not for the treatment of any underlying medical condition suffered by the taxpayer; as noted, he stipulated that he was not infertile and that his previous children had been produced by natural processes in conjunction with the woman who was his wife at the time. In addition, the procedures were not for the purpose of affecting any structure or function of taxpayer's own body. Rather, they affected the bodies of the gestational carriers who, petitioner agrees, were not his dependents. Consequently, the tax court properly affirmed the Commissioner's disallowance of the deductions. The decision of the tax court is summarily affirmed. See First Circuit Local Rule 27.0(c).

AFFIRMED

By the Court:
/s/ Margaret Carter, Chief Deputy Clerk

cc: William Magdalin
Nathan J. Hochman
Robert William Metzler
Clarissa C. Potter
Patrick J. Urda

WILLIAM MAGDALIN,
Petitioner
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

UNITED STATES TAX COURT

T.C. Memo. 2008-293

Filed December 23, 2008

R determined deficiencies in P's Federal income tax for 2004 and 2005. After P's concessions, the sole issue is whether P is entitled to deductions under sec. 213, I.R.C., for expenses incurred in fathering children through unrelated gestational carriers via the in vitro fertilization of an anonymous donor's eggs using P's sperm.

Held: Because there is no causal relationship between an underlying medical condition or defect and P's expenses, and because the expenses at issue were not incurred for the purpose of affecting a structure or function of P's body, P is not entitled to deductions for those expenses and is liable for the deficiencies.

William Magdalin, pro se.

Daniel P. Ryan, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

WHERRY, Judge: This case, which involves a petition for redetermination of deficiencies for petitioner's 2004 and 2005 tax years, has been submitted for decision without trial. See Rule 122.[1] In the notice of deficiency, respondent disallowed deductions for medical expenses and charitable contributions petitioner claimed for 2004 and 2005. Respondent also increased the amount of taxable dividends petitioner reported for 2005. Petitioner concedes the charitable contribution and dividend issues. He challenges only respondent's disallowance of the deductions for medical expenses.

FINDINGS OF FACT

Petitioner is a medical doctor licensed to practice medicine in Massachusetts. At all relevant times, his sperm count and motility were found to be within normal limits. He has twin sons from a marriage to his former spouse, Deborah Magdalin. The twins were born through natural processes and without the use of in vitro fertilization (IVF).

In July 2004 petitioner entered into an Anonymous Egg Donor Agreement under which an anonymous donor was to donate eggs to be fertilized with

petitioner's sperm and transferred to a gestational carrier using the IVF process.[2] That same month, petitioner also entered into a Gestational Carrier Agreement in which a woman (the first carrier) agreed to become impregnated through the IVF embryo transfer process with the embryo created from the anonymous donor's egg and petitioner's sperm and to bear a child for petitioner. The first carrier gave birth to a child on September 17, 2005.

On November 18, 2005, petitioner entered into a similar Gestational Carrier Agreement with another woman (the second carrier). The second carrier gave birth to a child on August 12, 2006. The donor was not the spouse or dependent of petitioner. Nor was either of the carriers. Both IVF procedures occurred at the Reproduction Science Center (IVF clinic) in Lexington, Massachusetts.

Petitioner paid the following expenses in 2004 relating to the aforementioned agreements: (1) $3,500 for petitioner's legal fees relating to the first donation cycle under the Anonymous Egg Donor Agreement; (2) $500 for the donor's legal feesrelating to the Anonymous Egg Donor Agreement; (3) $10,750 for the donor's fees and expenses; (4) $8,000 for the first carrier's fees and expenses; (5) $25,400 to the IVF clinic; and (6) $2,815 for prescription drugs for the first carrier.

In 2005 petitioner paid the following relevant expenses: (1) $750 for petitioner's legal fees relating to the second donation cycle under the Anonymous Egg Donor Agreement; (2) $17,000 for the first carrier's fees and expenses; (3) $14,270 for petitioner's legal fees relating to the Gestational Carrier Agreement with the second

carrier; (4) $1,000 for the second carrier's legal fees relating to the Gestational Carrier Agreement; (5) $2,615.10 to the IVF clinic; (6) $300 to Lawrence General Hospital for costs relating to the first carrier's stay during delivery of the first child; (7) $1,181.25 for the first carrier's legal fees relating to legal proceedings concerning a dispute over the issuance of the first child's birth certificate; and (8) $838 for prescription drugs for both carriers. There is no evidence that petitioner was compensated for any of those expenses by insurance orotherwise.

Petitioner filed his 2004 and 2005 Federal income tax returns on time. On Schedules A, Itemized Deductions, included with those returns he deducted medical expenses of $34,050 for 2004 and $28,230 for 2005.[3] On March 22, 2007, respondent issued petitioner a notice of deficiency for his 2004 and 2005 tax years. Therein, respondent disallowed petitioner's claimed medical expense deductions in their entirety. On April 3, 2007, petitioner, who then resided in Massachusetts, filed a timely petition with thisCourt.

OPINION

I. Deductions for Medical Expenses [4]

Section 213(a) allows for the deduction of paid expenses "not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent * * * to the extent that such expenses exceed 7.5 percent of adjusted gross income." While Congress has indicated an intent, once section 213 applies, to broadly define medical care, see S. Rept. 1631, 77th Cong., 2d Sess. 95-96 (1942), 1942-2 C.B. 504, 576, we have characterized section 213 as carving out "a limited exception" to the general rule in section 262 that prohibits the deduction of per-

sonal, living, or family expenses. Jacobs v. Commissioner, 62 T.C. 813, 818 (1974); see Gerstacker v. Commissioner, 414 F.2d 448, 450 (6th Cir. 1969), revg. and remanding 49 T.C. 522 (1968). Consequently, the medical expense deduction has been narrowly construed for many years, as the Court noted more than 40 years ago in Atkinson v. Commissioner, 44 T.C. 39, 49 (1965). The deductibility of the expenses at issue hinges on whether they were paid for petitioner's medical care. If so, they are deductible medical expenses under section 213. If not, they are nondeductible personal expenses under section 262.

The term "medical care" includes amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body". Sec. 213(d)(1)(A). The regulations provide that "Deductions for expenditures for medical care allowable under section 213 will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness." Sec. 1.213-1(e)(1)(ii), Income Tax Regs.

We have interpreted the statute as requiring a causal relationship in the form of a "but for" test between a medical condition and the expenditures incurred in treating that condition. See Jacobs v. Commissioner, supra at 818 (noting that "the payment for which a deduction is claimed must be for goods or services directly or proximately related to the diagnosis, cure, mitigation, treatment, or prevention of the disease or illness"); Havey v. Commissioner, 12 T.C. 409, 413 (1949) ("An incidental benefit is not enough."). The "but for" test requires petitioner to prove (1) "that the expenditures were an essential element of the treatment" and (2) "that they would not have otherwise been incurred for nonmedical reasons." Jacobs v. Commissioner, supra at 819.

It is also noteworthy that section 213(d)(1)(A), which is not a model of clarity, is phrased disjunctively -- it allows for the deduction of any expenses paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body". Sec. 213(d)(1)(A) (emphasis added); see Dickie v. Commissioner, T.C. Memo. 1999-138 ("The deductibility of medical care payments under section 213 is not strictly limited to traditional medical procedures, but it includes payments made for the purpose of affecting any structure or function of the body."). Although the phrase "for the purpose of affecting any structure or fun tion of the body" was historically interpreted by the Internal Revenue Service and the Court to allow taxpayers to deduct the costs of a wide array of cosmetic procedures, Congress felt this was too liberal a tax deduction because it resulted from a personal expense and not a medical one. As a consequence, in 1990 Congress restricted taxpayers' ability to do so.[5]

II. Parties' Contentions

Petitioner argues that it was his civil right to reproduce, that he should have the freedom to choose the method of reproduction, and that it is sex discrimination to allow women but not men to choose how they will reproduce. While he correctly acknowledges that Internal Revenue Service private letter rulings are "not legal precedent", he refers to Priv. Ltr. Rul. 2003-18-017 (Jan. 9, 2003) to show that "the expenses for egg donor, medical and legal costs are deductible medical expenses".

"Although respondent believes that amounts paid for procedures to mitigate infertilitymay qualify as

deductible medical care", respondent argues that "Petitioner had no physical or mental defect or illness which prohibited him from procreating naturally", as he in fact has, and that "the procedures were not medically indicated." [6] Respondent's position is that the expenses at issue are nondeductible under section 262 because "Petitioner's choice to undertake these procedures was an entirely personal/nonmedical decision."

III. The Expenses at Issue Are Nondeductible Personal Expenses

The expenses at issue were not paid for medical care under the first portion of section213(d)(1)(A) because the requisite causal relationship is absent. None of the expenses at issue was "incurred primarily for the prevention or alleviation of a physical or mental defect or illness." Sec. 1.213-1(e)(1)(ii), Income Tax Regs. In other words, petitioner had no medical condition or defect, such as, for example, infertility, that required treatment or mitigation through IVF procedures. We therefore need not answer lurking questions as to whether (and, if so, to what extent) expenditures for IVF procedures and associated costs (e.g., a taxpayer's legal fees and fees paid to, or on behalf of, a surrogate or gestational carrier) would be deductible in the presence of an underlying medical condition. [7] See supra note 6. We leave such questions for another day. Further, petitioner cannot deduct those expenses under the second portion of the statute because they did not affect a structure or function of his body.[8]

Although petitioner at times attempts to frame the deductibility of the relevant expenses as an issue of con-

stitutional dimensions, under the facts and circumstances of his case, it does not rise to that level. Petitioner's gender, marital status, and sexual orientation do not bear on whether he can deduct the expenses at issue. He cannot deduct those expenses because he has no medical condition or defect to which those expenses relate and because they did not affect a structure or function of his body. Expenses incurred in the absence of the requisite underlying medical condition or defect and that do not affect a structure or function of the taxpayer's body are nondeductible personal expenses within the meaning of section 262.

The Court has considered all of petitioner's contentions, arguments, requests, and statements. To the extent not discussed herein, we conclude that they are meritless, moot, or irrelevant.

To reflect the foregoing,

Decision will be entered for respondent.

FOOTNOTES

[1] Section references are to the Internal Revenue Code of 1986, as amended and in effect for the tax years at issue. Rule references are to the Tax Court Rules of Practice and Procedure.

[2] That agreement was amended in Dec. 2004 "in connection with the arrangements for a second fresh egg donation cycle".

[3] The total amounts of his claimed medical expenses were $52,310 in 2004 and $43,593 in 2005. The

amounts of the deductions were less because a taxpayer can only deduct medical expenses to the extent that they exceed 7.5 percent of the taxpayer's adjusted gross income for the year. Sec. 213(a).

[4] The taxpayer bears the burden of proving entitlement to the claimed deductions. Rule 142(a); Welch v. Helvering, 290 U.S. 111 (1933); Hradesky v. Commissioner, 65 T.C. 87, 89-90 (1975), affd. 540 F.2d 821 (5th Cir. 1976). Although sec. 7491(a) may shift the burden of proof to the Commissioner in specified circumstances, we need not decide which party bears the burden of proof because the outcome in this case does not depend on the burden of proof. Knudsen v. Commissioner, 131 T.C. __, __ (2008) (slip op. at 8).

[5] For example, the Internal Revenue Service used to permit a medical expense deduction for a facelift, performed solely to improve the taxpayer's appearance, because its purpose was to affect a structure of the tax payer's body. See Rev. Rul. 76- 332, 1976-2 C.B. 81; see also Mattes v. Commissioner, 77 T.C. 650, 655-656 (1981) (allowing a taxpayer to deduct the cost of a hair transplantation procedure undertaken by the taxpayer for cosmetic reasons). But Congress narrowed the range of deductible procedures by enacting the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101- 508, sec. 11342(a), 104 Stat. 1388-471, which added sec. 213(d)(9). Sec. 213(d)(9) provides that cosmetic surgery or similar procedures are nondeductible personal expenses "unless the surgery or procedure is necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease."

[6] Respondent also argues that "the expenses paid by petitioner were not for the purpose of affecting any

structure or function of petitioner's male body" and that "the procedures at issue only affected the structures or functions of the bodies of the unrelated surrogate mothers." In addition, respondent makes the unexplained assertion that respondent "does not believe that procreation is a covered function of petitioner's male body within the meaning of section 213(d)(1)".

[7] Under sec. 6110(k)(3) private letter rulings (PLRs) lack precedential status. Nevertheless, "such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws." Hanover Bank v. Commissioner, 369 U.S. 672, 686 (1962); see Transco Exploration Co. v. Commissioner, 949 F.2d 837, 840 (5th Cir. 1992), affg. 95 T.C. 373 (1990). In the PLR petitioner refers to, the Internal Revenue Service (IRS) concluded that egg donor fees and expenses, including legal fees for preparing a contract between the taxpayer and the egg donor, were deductible medical expenses for purposes of sec. 213. Although petitioner raises that PLR in his brief, there are important differences between his situation and that of the taxpayer requesting the PLR. The requesting taxpayer had "unsuccessfully undergone repeated assisted reproductive technology procedures to enable * * * [her] to conceive a child using * * * [her] own eggs." Priv. Ltr. Rul. 2003-18-017 (Jan. 9, 2003). And, the procedures were going to be performed "in order to enable * * * [her] to obtain a donated egg for implantation into * * * [her] body." Id.

In addition, although IRS publications are not authoritative sources of Federal tax law, we note that IRS Publication 502, Medical and Dental Expenses (2008), provides that procedures such as in vitro fertilization are deductible under sec. 213 if such expenses are incurred "to overcome an inability to have children."

[8] Where a medical procedure affects a structure or function of the taxpayer's body, the cost of such a procedure may be a deductible medical expense unless proscribed by sec. 213(d)(9). See supra note 5. A vasectomy is an example of a noncosmetic operation that the Commissioner has determined is deductible because it affects thestructure of a taxpayer's body. See Rev. Rul. 73-201, 1973-1 C.B. 140.

The dictionary defines "affect" as "to produce an effect upon" or "to produce a materialinfluence upon or alteration in". Merriam-Webster's Collegiate Dictionary 21 (11th ed. 2003). Petitioner's bodily functions and structures were not "affected" by the IVF processes -- they remained the same before and after those processes.

END OF FOOTNOTES

UNITED STATES TAX COURT

WILLIAM MAGDALIN, Petitioner
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 7880-07.

DECISION

Pursuant to the Memorandum Opinion of this Court (T .C . Memo . 2008-293) filed December 23, 2008, it is

ORDERED and DECIDED that there is an $11,056 deficiency in Federal income tax due from petitioner for his 2004 tax year and a $10,922 deficiency in Federal income tax due from petitionerfor his 2005 tax year.

(Signed) Robert A. Wherry, Jr.
Judge

Entered: Dec. 23, 2008

Served: Dec. 23, 2008